

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Application by SBC Communications Inc.,)	WC DOCKET NO. 02-306
Pacific Bell Telephone Company, and)	
Southwestern Bell Communications)	
Services, Inc. for Provision of In-Region,)	
InterLATA Services in California)	

COMMENTS OF DIRECTV BROADBAND, INC.

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Summary

DIRECTV Broadband, Inc. submits these comments to oppose SBC's Application for authority to provide interstate InterLATA Services that originate in California. The Commission should reject SBC's Application because SBC has foreclosed effective competition in the broadband services market by simultaneously violating its obligation to provide broadband connectivity to competing broadband services providers ("BSPs") on reasonable and nondiscriminatory rates and terms pursuant to its *Computer Inquiry* obligations, while at the same time precluding CLECs from offering a viable alternative to BSPs by refusing to make its DSL telecommunications service available for resale to CLECs pursuant to Section 251(c)(4) of the Act. At a minimum, SBC has failed to satisfy the resale element of the Section 271 market-opening checklist. More importantly, in view of SBC's overall conduct in the broadband market, the Commission cannot reasonably conclude that requested authorization is consistent with the public interest as required by Section 271(d)(3)(c) of the Act.

Among many examples of SBC conduct that harms the public interest, these comments will direct the Commission's attention to two SBC practices that are especially relevant to a Section 271 public interest analysis: (1) SBC's successful establishment of a price squeeze in the DSL market, under which SBC has taken advantage of informally relaxed cost justification requirements to charge competing BSPs more than ten dollars above SBC's retail rate for the necessary components of DSL connectivity; and (2) SBC's effective discrimination against competing BSPs by forcing them to obtain inefficient and unnecessary transport circuits into each LATA even after the justification for that requirement has been eliminated by the grant of interLATA authority in a state or region. The Commission should not grant SBC's Application at least until SBC's market-closing price squeeze and discriminatory interconnection requirements have been eliminated.

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COMMENTS OF DIRECTV BROADBAND, INC.

DIRECTV Broadband, Inc. (“DIRECTV Broadband”), one of the nation’s largest non-incumbent affiliated broadband services providers (“BSPs”), submits these comments to oppose the Application of SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. (collectively, “SBC”) for authority to provide interstate InterLATA Services that originate in California. DIRECTV Broadband offers retail high-speed DSL-based services to residential customers by connecting its nationwide network to consumers using last-mile wholesale digital subscriber line (“DSL”) connectivity and transport purchased from SBC and other ILECs, and, where possible, from CLECs. DIRECTV Broadband has a substantial interest in ensuring that BSPs are able to obtain access to consumers over the facilities of common carriers on rates and terms that are just, reasonable and nondiscriminatory.

Even if SBC satisfied the complete 14-point checklist – which, as the California PUC agrees, it has not – Section 271 approval requires much more than literal compliance with the checklist. Section 271(d)(3)(c) requires the Commission to consider the public interest impact of an interLATA authorization in the context of the 1996 Act’s ultimate objective of opening markets to competition. In *Sprint v. FCC*, the D.C. Circuit held that the Commission erred in

failing to consider in a Section 271 case whether an alleged price squeeze imposed by SBC between UNE and retail rates precluded effective competition, *even if* SBC demonstrated to the Commission's satisfaction its compliance with the checklist.¹ The court highlighted the ultimate market-opening objectives of the 1996 Act and reasoned that, in view of the public interest requirement of Section 271, the Commission could not reasonably grant interLATA authorization when an RBOC's wholesale rates and terms do not afford competitors a meaningful opportunity to compete.

As the Commission has recognized for two decades, the ability of independent BSPs such as DIRECTV Broadband to obtain DSL connectivity on reasonable rates and terms is essential to the development of competition in the broadband services market. Congress' intent for Section 271 to open markets to competition would be undermined if the Commission permits SBC to *simultaneously* avoid its DSL resale obligations to CLECs *and* engage in tactics specifically designed to impair the ability of BSPs to compete utilizing wholesale DSL connectivity provided by SBC pursuant to its obligations under the *Computer Inquiry* rules. Because SBC is aggressively seeking to suppress competition on both of these fronts, it has failed to satisfy the Section 271(c)(2)(B) checklist and has failed to demonstrate that grant of its application would serve the public interest as required by required by Section 271(d)(3)(C).

I. SBC'S REFUSAL TO RESELL DSL TO CLECS ENABLES IT TO ENGAGE IN TACTICS SPECIFICALLY DESIGNED TO ELIMINATE COMPETITION TO ITS RETAIL BROADBAND BUSINESS

SBC's failure to offer any of its residential DSL services at the resale discount, as discussed in Section II below, is a *per se* violation of Section 251(c) (4) of the Act that by itself warrants rejection of its Application. Although DIRECTV Broadband is not a CLEC that would

¹ *Sprint Communications Co., L.P. v. FCC*, 274 F.3d 549, 554 (D.C. Cir. December 28, 2001). While the price squeeze evaluated in this decision involved UNE rates, the fundamental tenant of the court's decision is that the Commission must undertake a public interest analysis that may go beyond literal and minimal application of the checklist. Moreover, the price squeeze SBC has set up within the DSL market results in part from SBC's failure to comply with the resale checklist item.

be eligible to purchase service under the resale discount, SBC's denial of resold DSL service to CLECs has negatively impacted BSPs by contributing to the decline of the competitive supply of wholesale DSL. Facilities-based CLEC competition has faltered in many markets, especially for residential DSL services. SBC's own filings in Docket 01-337 estimate that it controls 95% of the wholesale residential ADSL market in its thirteen-state territory.² The absence of resale as a market-entry option for DSL has therefore facilitated SBC's dominant position as a provider of wholesale DSL connectivity in its California service area; SBC is now the only provider from which DIRECTV Broadband is able to obtain wholesale DSL service in much of its region.³ BSPs would likely have a greater choice of possible suppliers if CLECs were able to obtain DSL connectivity under their Section 251(c)(4) rights, because resale would allow CLECs to quickly enter the market and provide ubiquitous service.⁴

The near-elimination of CLEC DSL providers has had serious consequences for DIRECTV Broadband and other BSPs, as well as for consumers. DIRECTV Broadband was once one of the largest customers of now-defunct competitive DSL transport providers such as NorthPoint and Rhythms, and enjoyed the competitive benefits of a market in which wholesalers vied for business among retailers like DIRECTV Broadband, and could not afford to methodically raise prices or openly discriminate in favor of their wholly owned retail ISPs if they wanted to attract and retain customers. In the absence of CLEC competition, however, SBC has increasingly abused its dominant position in the wholesale DSL market by discriminating in favor of its own retail BSP affiliates and by consistently raising wholesale DSL rates in a time of declining costs and increasing efficiencies. Among many examples, these comments focus on

² Docket 01-337, SBC Non-Dominance Petition, Declaration of Robert W. Crandall and J. Gregory Sidak, at ¶ 55. Although the Declaration postulates that ILECs control approximately 84% of the DSL lines, it recognizes that most CLEC lines serve business customers, and accordingly, estimates that SBC has 95% of the wholesale residential DSL lines in its region.

³ See Comments of DIRECTV Broadband, Docket 01-337, at 5-7 (March 1, 2002).

⁴ Meaningful choice would only be assured if regulators prevented SBC from imposing unreasonable rates and terms on CLEC resellers.

two SBC practices that are especially relevant to a Section 271 public interest analysis: (1) SBC's successful establishment of a price squeeze in DSL, under which SBC has taken advantage of informally relaxed cost justification requirements to charge competing BSPs more than ten dollars above SBC's retail rate for the necessary components of DSL connectivity; and (2) SBC's effective discrimination against competing BSPs by forcing them to obtain inefficient and unnecessary transport circuits into each LATA even after the justification for that requirement was eliminated by the grant of interLATA authority. SBC's discriminatory practices against BSPs have been able to succeed because, as the California PUC found, SBC first succeeded in erecting unreasonable barriers to entry by CLECs in the California market for wholesale DSL connectivity. These barriers to entry deprive BSPs of any viable alternatives for wholesale DSL suppliers, and DIRECTV Broadband therefore agrees with the California PUC that they are inconsistent with the public interest and the requirements of Section 271.

A. SBC Has Imposed a Price Squeeze on Retail Competitors by Consistently Raising Wholesale Prices without Cost Justification, and By Setting Retail DSL Prices Significantly Below the Inflated Wholesale Prices Charged to Independent BSPs

Under the *Computer Inquiry* rules, SBC is required to make available DSL connectivity to non-affiliated ISPs on the same rates, terms and conditions that it affords to its own ISP operations. The rates and terms that SBC officially provides service to its ISP affiliates are set forth in the tariffs of SBC-ASI and other SBC affiliates.⁵ However, the ability of the SBC ISPs to price their services below their "official" costs, as illustrated below, demonstrates that SBC's own ISP operations are in fact unlawfully accorded preferential treatment and/or improperly cross-subsidized. SBC need not be concerned if its ISP affiliates "lose" money on paper as long

⁵ In practical terms, companies who must purchase wholesale DSL connectivity from SBC-ASI and at the same time compete at retail with SBC's ISP affiliates observe no meaningful real-world distinction between SBC, ASI, or SBC's ISP affiliates. As described below, no objective observer could reasonably conclude that SBC's ISP affiliates can sell DSL-based retail services for \$29.95 monthly, pay SBC-ASI over \$40 monthly for inputs to the service, and maintain itself as a separate business without significant cross-subsidies or reduced wholesale pricing that more closely approximates SBC's real cost of providing DSL connectivity.

as in the aggregate DSL remains profitable for SBC. SBC can afford to “pay” itself too much for wholesale DSL connectivity and ATM transport, or the UNEs that underlie these services, and still charge whatever retail rate will allow it to capture customers from non-affiliated ISPs, provided that the relationship between the cost of service and the retail price is a matter that can be handled through accounting tools and transfers not visible to the Commission.⁶ For independent ISPs, by contrast, SBC’s inflated wholesale rates are a real cost. Until SBC-ASI’s rates are subjected to meaningful review under applicable dominant carrier regulations,⁷ SBC can continue to manipulate its wholesale and retail DSL pricing to make sure that the gap between these rates is too small (or even a negative number) to permit viable competition, thereby effecting a price squeeze.

SBC’s new DSL retail rates released in September 2002 provide a textbook example of a price squeeze in operation. While SBC has applied a price squeeze in varying degrees for several years,⁸ its new retail pricing “promotion” greatly escalates SBC’s war on competition from independent BSPs. For example, SBC’s ISPs are now selling residential 1.5 mbps ADSL-

⁶ The most important element for the success of SBC’s price squeeze has been its ability so far to avoid meaningful review of the reasonableness of ASI’s tariffed rates. Neither the Commission nor any other objective third parties have had an opportunity to evaluate the actual cost of providing DSL connectivity because ASI has inexplicably been permitted to file and amend its tariff without providing any evidentiary support of its costs or rates. SBC has thus been effective so far in preventing the Commission or ASI’s customers from making cost inquiries and accounting analysis that might have prevented SBC from consistently raising prices in a time of improving scale and declining costs – or from setting up the price squeeze that now threatens the future of competition.

⁷ DIRECTV Broadband has repeatedly objected to the Commission’s unjustified practice of allowing SBC, as a dominant carrier, to file and amend its wholesale DSL rates without any cost support or other justification. See DIRECTV Broadband Comments, Docket 01-337 at 16-18 (March 1, 2002); DIRECTV Broadband Reply Comments, Docket 02-33, at 23-25 (July 1, 2002); Petition of DIRECTV Broadband to Reject or Suspend and Investigate Proposed Tariff Revisions, SBC Advanced Solutions, Inc. FCC Tariff No. 1, Transmittal No. 11 (September 30, 2002). The Commission’s inexplicable abdication of its responsibility to require cost justification from ASI, which appears to have been put into place informally without notice or opportunity for public comment, violates the D.C. Circuit’s decision in *ASCENT v. FCC*, 235 F.3d 662, 666 (D.C. Circuit January 9, 2001). More importantly, the absence of cost support information undermines one of the only possible means for independent BSPs and the Commission to evaluate and address the abuses to which competitors and consumers will (continue to) be subjected if SBC is provided the opportunity to set rates, terms and conditions without oversight. DIRECTV Broadband respectfully repeats its request that the Commission require ASI to provide cost support and a meaningful notice period for its tariff filings.

⁸ See Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20 and 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket No. 98-10, Initial Comments of the California ISP Association, Inc. (April 16, 2001) at 16-18 (detailing RBOC DSL price squeezes, including SBC).

based Internet services for \$29.95 per month for a full year of service.⁹ This retail rate is irreconcilable with the SBC-ASI tariff, under which a BSP must pay SBC \$35-39 per end user for the last-mile connection,¹⁰ and the fact that a BSP must also spend approximately \$9 per end user for ATM transport.¹¹ In addition, a significant portion of a BSPs' cost structure is attributable to the costs of Internet access, e-mail, web hosting, equipment, billing, customer support and other expenses. In sum, **SBC's \$29.95 retail rate is at a minimum \$14 per month lower than SBC-ASI's basic rates for last-mile access and ATM transport, and of course far less than the overall cost of providing retail service when using ASI wholesale service as an input.** It is impossible for an independent BSP using SBC-ASI's tariffed wholesale rates to compete with the new SBC-ISP pricing. SBC's staggering restraint of competition must be addressed before the Commission can reasonably conclude that the California market is open to competition and that interLATA authorization is consistent with the public interest.

DIRECTV Broadband would not shy from retail price competition with SBC's ISP affiliates if it were able to obtain wholesale access on reasonable and nondiscriminatory rates and terms. DIRECTV Broadband and other independent BSPs are eager to encourage broadband adoption through lower retail pricing. The high price of consumer broadband is repeatedly cited as the leading impediment to consumer broadband adoption in the United States,¹² while studies demonstrate that broadband adoption rates are much higher in countries with lower retail

⁹ See www.pacbell.com/dsl and follow links to Residential Special Offers (viewed October 9, 2002). The advertised period for the \$29.95 rate is six months but DIRECTV Broadband has determined that SBC's sales agents will readily extend the discounted price for a full year.

¹⁰ See ASI FCC Tariff No. 1 at § 6.6.

¹¹ This estimate is based upon DIRECTV Broadband's actual experience in purchasing ATM service and transport from SBC-ASI and IXCs in association with its purchase of wholesale DSL services. The rate elements that comprise SBC-ASI's portion of this service are set forth in ASI FCC Tariff No. 1 at § 4. Every BSP purchasing wholesale DSL connectivity from SBC-ASI, including SBC's ISP affiliates, must incur these types of charges.

¹² U.S. Department of Commerce, Office of Technology and Policy, *Understanding Broadband Demand*, http://www.ta.doc.gov/reports/TechPolicy/Broadband_020921.htm, at 14 ("the most obvious factor limiting broadband demand today is cost", citing recent double-digit percentages in retail rates; and citing August 2002 Yankee Group study indicating that high prices are the leading impediment to broadband adoption in the residential market, according to 72% of the survey's respondents). See also Remarks of Chairman Powell, October 25, 2001 ("the intriguing statistic is that though [85%] of households have [broadband] availability, only 12% of these households have chosen to subscribe. There are many possible reasons for the demand gap. Consumers may not yet value the services at the prices they are being offered."), <http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html>.

broadband prices.¹³ However, it is impossible for independent BSPs to survive, much less engage in sustainable price competition, under SBC's punishing price squeeze. SBC has raised its wholesale prices significantly in the past year, without providing any cost support, even while its own statements indicate that its provisioning costs are falling.¹⁴ SBC's excessive wholesale rates, improper cross subsidization of its retail division, and its ability to capture consumer accounts with below-cost retail pricing (at least below the costs set forth in its tariffs) will continue to enable SBC to impose a price squeeze on its wholesale customers, thereby squeezing competition out of the market.

The Commission is required to consider the public interest ramifications in determining whether it can grant Section 271 authority. In the face of SBC's use of its dominant position as a provider of wholesale DSL connectivity in order to suppress competition among its retail competitors in DSL, the Commission cannot reasonably conclude that it is in the interest of California consumers to empower SBC to engage in even greater cross-market manipulation. Therefore, the Commission should not grant SBC's Application at least until DIRECTV Broadband's pending protest of ASI's tariff proposals has been resolved by the Commission and until SBC's price squeeze has been eliminated.

B. SBC's Inefficient Per LATA Interconnection Requirements Unlawfully Disadvantage Independent BSPs Once SBC Obtains InterLATA Authorization

In commenting upon prior Section 271 applications, DIRECTV Broadband has demonstrated the significant anticompetitive impact of allowing an ILEC with interLATA

¹³ See, e.g., *DSL Worldwide Directory*, Ed. 5, Apr. 2002, www.point-topic.com (illustrating that broadband adoption rates are significantly higher in South Korea and Canada, where typical retail DSL rates are approximately \$30.)

¹⁴ See SBC Investor Report, 2nd Quarter 2001, http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf, at 5 (describing 25% reduction in DSL acquisition costs). In view of these declining costs, combined with SBC-ASI's service-speed reductions and steady price increases over the past three years, SBC's failure to submit cost support may mask extraordinary profits in DSL. Even after a fair rate of return is applied, the appropriate rate for mass-market ADSL connectivity in scale is far less than \$20. In this context, the Commission may more readily ascertain the reason for alarm among independent BSPs as the Commission has set aside the normal accounting oversight involved in requiring cost justification for price increases and other changes to SBC-ASI's tariff.

authority to require BSPs to obtain unnecessary, costly and inefficient DSL transport circuits into each LATA in which they have customers. Ostensibly because SBC was not authorized to carry DSL traffic across LATA boundaries, SBC has required BSPs to purchase a separate “Egress Circuit” into each LATA where the BSP offers service to consumers. However, SBC maintains the separate Egress Circuit requirement even in regions where SBC has long since obtained Section 271 authority and no longer faces any prohibition against carrying traffic across a LATA boundary.¹⁵ The single Egress Circuit requirement harms competing BSPs to a greater degree than it does SBC’s affiliate, which is the largest BSP in most areas and can therefore typically utilize an Egress Circuit most efficiently. Maintaining the single Egress Circuit requirement even in states where 271 authorization has made the requirement obsolete allows SBC to perpetuate a cost advantage and barrier to competition favoring its affiliated BSPs, such as Pacific Bell Internet in California.

While the Commission in prior 271 decisions decided that this issue is beyond the scope of the Section 271 checklist, DIRECTV Broadband respectfully submits that in conjunction with SBC’s failure to offer its DSL for resale, SBC’s anticompetitive practices in the wholesale DSL market are relevant to the analysis of checklist compliance and, more importantly, to the public interest analysis mandated by Section 271(d)(3)(C). Under this public interest analysis, the Commission should consider the critical importance of data transport requirements in either promoting or suppressing competition for broadband services and the link between RBOC interLATA transport authority and the benefits of a more cost-efficient and competitive transport model for DSL services. In the absence of relief, SBC will continue to impose its inefficient, costly and unreasonable Egress Circuit requirement on BSPs while SBC achieves great cost savings by carrying its own interLATA transport. BSPs’ DSL traffic should benefit from the

¹⁵ See Petition of DIRECTV Broadband to Reject or Suspend and Investigate ASI’s Proposed Tariff Revisions, (September 30, 2002) (challenging reasonableness of this requirement).

same efficiency, but inexplicably since securing 271 authority in several states, SBC continues to require each BSP to pull traffic off of SBC's ATM network at every LATA boundary.¹⁶

The emergence of Internet Protocol ("IP") as a transport technology raises the stakes of this issue significantly. IP will likely replace SBC's utilization of ATM transport for wholesale DSL in the near future, in part because it is significantly less expensive. The IP product could connect customers region-wide crossing LATAs and delivering traffic to BSPs in a more efficient manner than SBC's existing service. The Commission must carefully investigate two key elements of SBC's conversion to IP: price and customer interference issues. The Commission should evaluate these issues in light of SBC's current and historic abuses on both fronts. First, as described above, after more than a year of relaxed standards for providing cost information to justify price increases, SBC recently introduced a retail price for 1.5 mbps ADSL services that is over ten dollars below its wholesale pricing. IP is a more efficient technology with lower priced equipment and therefore the price SBC charges for IP transport should be much lower than the current already artificially inflated transport pricing. If SBC is allowed to make a change to IP based transport without an appropriate decrease in SBC's already inflated prices for DSL transport and connectivity, then SBC will be able to continue to exploit its price squeeze by using the savings to further improperly cross-subsidize its retail division with revenue from its wholesale wireline operations in order to drive out competition for retail DSL services. Therefore, the Commission must ensure that future changes to ASI's tariff are subjected to a minimum cost support requirements applicable to dominant carriers, and to a meaningful period for public comment. Otherwise, SBC will further cement its anticompetitive price squeeze and discriminatory practices, and consumers and competition will be the losers.

¹⁶ Notwithstanding any Section 272 separation requirements, SBC can, if it had the institutional will to do so, offer interLATA service to BSPs through one or more of its affiliates once SBC has obtained Section 271 authority and intrastate interLATA authority from the state.

SBC's transition to IP transport may also threaten competition by providing SBC a mechanism to directly interfere with the quality of its competitors' DSL-based services. IP technology makes it far easier for SBC to overlay its services on the DSL connection purchased by a competing BSP, thereby degrading the speed and performance of the DSL connection utilized by the BSP. DIRECTV Broadband has opposed this threat since September 2001 when SBC first attempted to force its BSP customers to accept this interference contractually through the "BCG" requirement and through a proposed tariff amendment of the same effect. Despite repeated requests for written assurances that SBC will not use DIRECTV Broadband's customer information to deploy and market competing services that could degrade DIRECTV Broadband's DSL connection, SBC has refused to make that commitment. Before any IP based product is approved, among other things the Commission must obtain enforceable assurances that SBC will not interfere with the relationships between BSPs and their customers as it attempted to sanction through the tariff changes and contractual requirements proposed over the past year.

In summary, the Commission should require SBC, as a condition to obtaining any further Section 271 authority, to first provide efficient region-wide data transport to BSPs in areas where it already has interLATA authority and it should require this "aggregated transport" to be in place and functioning to the satisfaction of the Commission for some meaningful period of time at a price reasonably related to actual cost before the Commission allows SBC to benefit from an additional grant of interLATA authority.

II. THE TELECOMMUNICATIONS SERVICE PORTION OF SBC'S RETAIL DSL OFFERING IS SUBJECT TO SECTION 251(C)(4).

SBC is the largest retailer of DSL-based services in California, yet it claims to offer no retail DSL telecommunications services. The California PUC saw through SBC's transparent position, and this Commission should as well. Indeed, the Commission is prohibited under the *ASCENT* decision from allowing SBC to "sideslip § 251(c)'s requirements by simply offering

telecommunications services through a wholly owned affiliate.”¹⁷ The California PUC explained that the affiliation between the SBC ILEC, ASI, and the SBC ISPs effectively constitutes SBC’s provision of DSL Transport Services at retail in California, and therefore concluded that by failing to offer the transport service pursuant to Section 251, SBC “has erected unreasonable barriers to entry in California’s DSL market” and failed to satisfy the resale portion of the Section 271 checklist.¹⁸

As demonstrated below, the resale obligation clearly applies to the telecommunications portion of the DSL-based high-speed packet access service sold at retail by SBC’s ISP affiliates, including Pacific Bell Internet in California.¹⁹ Even SBC and other RBOCs agree that the DSL transport service provided by SBC-ASI to BSPs is, when standing alone, a telecommunications service.²⁰ It is also plainly evident that SBC’s ISP affiliates sell DSL-based services at retail to customers who are not carriers, and the D.C. Circuit’s decision in *ASCENT* clearly establishes that the obligations of Section 251 apply to all telecommunications services offered by any SBC affiliate, including Pacific Bell Internet.²¹ The only outstanding issue is whether SBC can evade its resale obligation by simply selling a telecommunications service at retail only as part of a bundle with information services.

¹⁷ *ASCENT v. FCC*, 235 F.3d 662, 666 (D.C. Circuit January 9, 2001).

¹⁸ Decision Granting Pacific Bell Telephone Company’s Renewed Motion for An Order That it Has Substantially Satisfied the Requirements of the 14-Point Checklist in § 271 of the Telecommunications Act of 1996 and Denying That it Has Satisfied §709.2 of the Public Utilities Code, Public Utilities Commission of the State of California, Rulemakings (R.) 93-04-003 and R.95-04-043, and Investigations (I.) 93-04-002 and I.95-04-044 (released September 19, 2002) at 220.

¹⁹ DIRECTV Broadband agrees that Internet content and interactive applications offered by BSPs are information services that are not subject to Title II regulation. In addition, DIRECTV Broadband does seek to overturn the Commission’s 1999 decision in the *Advanced Services Second Report and Order* that the resale discount obligations do not apply to the DSL transport service that ASI sells to unaffiliated ISPs. Instead, the rate should be calculated using the retail price for the SBC-ISPs’ bundled service, less the portion of the rate attributable to Internet and other enhanced services, and less the avoided cost discount calculated pursuant to Section 252(d)(3). Finally, this issue is unrelated to the question of whether ILECs must offer to sell their own retail DSL services where voice service is provided by a CLEC reseller, which was addressed in the *Connecticut 271* order, among others.

²⁰ See DIRECTV Broadband Reply Comments, Docket 02-33 at 21-22 (quoting statements from SBC, Verizon and BellSouth); *See also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Docket 98-147, Second Report and Order, FCC 99-30 (rel. Nov. 9, 1999) at ¶ 10.

²¹ *ASCENT v. FCC*, 235 F.3d 662 (D.C. Cir. January 9, 2001) (“*ASCENT*”); *Connecticut 271 Order* at ¶ 32.

Although the Commission's *Broadband NPRM* suggested that this is a question of first impression, past Commission decisions have precluded facilities-based carriers from invoking the "contamination doctrine" to exempt their bottleneck common carrier facilities from regulation under Title II simply by adding information services to their regulated services offerings. The Commission has concluded that "application of the contamination doctrine to the BOCs would result in 'an improper policy result'", "because it would allow circumvention of the Computer II and Computer III basic-enhanced framework . . . [and enable the carrier] to avoid Computer II and Computer III unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result."²²

Exemption of SBC's DSL resale obligations would lead to similar undesirable results in the DSL market. Although not a panacea, the availability of a DSL resale product under Section 251(c)(4) would provide a safety valve to enable competitive entry where other means have failed or been delayed, and thereby lessen SBC's ability to suppress competition through a price squeeze. One of the most important and unique benefits of the resale requirement is that it imposes a self-executing mechanism to ensure that competitors will always have at least some form of access to consumers at a rate that is lower than that at which the ILEC offers its own retail services. If a resale discount were calculated appropriately, ILECs would likely adjust their wholesale DSL rates to ensure that the rates are not substantially higher than a new resale rate offered to CLECs. Otherwise, ISPs would likely turn *en masse* to CLECs for service based on the resold product. Such an automatic check on SBC's pricing would contrast markedly with SBC's current rates, which have no real-world connection to SBC's retail rates and instead

²² *Independent Data Communications Manufacturers Association, Inc. and American Telephone and Telegraph Co. Petition for Declaratory Ruling That All IXC's be Subject to the Commission's Decision on the IDCMA Petition*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13723, at n. 73 (1995) (citing Computer III Notice, FCC 85-397, ¶¶ 32, 44 (1985)).

reflect only the unilateral decisions of SBC to effect its own anticompetitive purposes, including the price squeeze discussed above.

Unlike UNE and tariffed access rates, the resale rate would change whenever the ILEC retail rate changes; and the ILECs' retail rate is of course that against which BSP competitors ultimately must compete. If the SBC ISPs extend a new six-month promotion with reduced rates, under resale regulations the promotion for the telecommunications services portion of the service would automatically be available to CLEC resellers. Since the SBC ISPs are unregulated and can change their rates at will, the self-executing resale mechanism is the only regulatory tool that can respond quickly enough to keep SBC's price squeeze motivation in check. The resale option therefore can serve as a form of checks and balances in the DSL market, so that no matter what anticompetitive measures SBC attempts, there would always be a product available at the rates calculated by application of Section 252(d)(3) to the retail rates charged by SBC's ISP affiliates. No such product exists today, and as a result SBC's market power is very much unchecked and the market is significantly out of balance.

SBC has improperly leveraged its dominant provider status for DSL connectivity and transport to capture the vast majority of the retail DSL consumer market and (in the absence of the application of the cost justification rules) to establish a price squeeze under which it will be impossible for independent BSPs to compete on the basis of price, quality, customer service and innovation in broadband. The classification of bundled information/telecommunications services as a non-regulated service was designed to allow a competitive information services market to thrive without the burdens of Title II regulation. It would be ironic if the Commission's policy designed to protect ISPs from the burdens of regulation were used by the most regulated of carriers to suppress, and ultimately destroy, competition in the very market the policy was designed to foster. Therefore, the Commission should not allow SBC to invoke the

contamination doctrine to classify its retail DSL-based services as an information service that is exempt from Section 251(c)(4).


While in previous Section 271 cases the Commission has deferred this issue to the pending Broadband proceeding, SBC's continued anticompetitive conduct on all fronts in the broadband market warrants immediate action. The simple fact is that the absence of competition for DSL transport in California, which results in part from the absence of a DSL resale product, has imperiled competition to a degree that it may not survive without timely action by the Commission. To effectuate the market-opening purpose of Sections 251 and 271, the Commission should not grant SBC's Application without enforcing necessary changes to SBC's wholesale provisioning to BSPs and CLECs that are necessary to satisfy the public interest requirement of Section 271(d)(3)(C) of the Act.

III. CONCLUSION

The Commission should not grant SBC's Application at least until SBC's market-closing price squeeze and discriminatory interconnection requirements have been eliminated. The Commission should investigate SBC's price squeeze in DIRECTV Broadband's pending petition against the SBC-ASI tariff, and it should require SBC to submit comprehensive cost studies so that a broader evaluation of SBC's rates can be conducted. Second, the Commission should require SBC to provide efficient region-wide data transport to BSPs in areas where it already has interLATA authority and commit to providing it in any new states where it obtains such authority. Finally, in view of SBC's ongoing tremendous anticompetitive pressures in the DSL market, the Commission can no longer responsibly defer action on SBC's failure to make available for resale the telecommunications portion of its retail DSL-based services pursuant to Section 251(c)(4). Until these three matters are addressed, the Commission cannot reasonably

conclude that grant of SBC's Application would conform to the checklist requirements of Section 271(c)(2)(B) or the public interest requirement of Section 271(d)(3)(C).

Respectfully submitted,



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